United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,762

NATHAN M. BOOTH,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee

Forma Pauperis Appeal From a Judgment of the United States District Court for the District of Columbia

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November 6, 1964

QUESTIONS PRESENTED

The questions presented by this appeal are:

(1) Has the Appellant been denied his constitutional protection "against unreasonable searches and seizures" under the 4th Amendment to the United States Constitution, where the arresting officer proceeded to Appellant's apartment without a warrant and without "probable cause" and there arrested the Appellant, seized the alleged criminal weapon and obtained a confession from Appellant?

(2) Has the Appellant been denied his constitutional protection "against unreasonable searches and seizures" where both the alleged criminal weapon and Appellant's confession, being the fruits of an illegal search and seizure, were not suppressed but were instead introduced and accepted in evidence?

(3) Has the Appellant been denied his constitutional rights to the "assistance of counsel for his defense" under the 6th Amendment to the United States Constitution, where Appellant was not advised, prior to his questioning by the arresting officer, of his constitutional right to counsel and his further right to remain silent, and the confession thus obtained was not suppressed but was instead introduced and accepted in evidence?

(4) Has the Appellant been denied his constitutional right "to a speedy . . . trial" under the 6th Amendment to the United States Constitution where Appellant was arrested on September 22, 1963 and arraigned on November 2, 1963, and tried commencing March 2, 1964, and during this whole period Appellant was confined within the District of Columbia jail?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Nathan M. Booth, appellant, was tried and convicted in the United States District Court of the offense of assault with a dangerous weapon, in violation of 22 D.C.C. §502. The District Court entered a judgment and verdict against appellant on March 4, 1964. Appellant's motion for leave to prosecute appeal without prepayment of costs was granted and Notice of Appeal was filed on June 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1291.

STATEMENT OF THE CASE

Appellant, Nathan M. Booth, was arrested on September 22, 1963. He was indicted on November 18, 1963 on the charge of assault with a deadly weapon. His trial commenced on March 3, 1964. It concluded the following day and he was found guilty. He was sentenced for a term of from two to seven years on August 10, 1964.

Appellant was a house painter who had worked on and off for a local firm for two years (Tr. 93). On Saturday evening, September 21, 1963, the evening preceding the assault incident, appellant and the co-tenant of his second-floor apartment went to a nearby tavern and spent close to two hours there drinking beer (Tr. 95-96). Both men returned to the apartment that evening and went to bed about 11:30 p.m. (Tr. 97). They arose the following morning, Sunday, September 22, 1963, and commenced drinking beer (Tr. 97).

The assault incident occurred around noon on Sunday (Tr. 36-37). The complaining witness, David R. Lohr, and an acquaintence, Truman Wallace, were visiting and drinking coffee in the first-floor apartment of Mr. Lohr (Tr. 36 and 43). During the course of this visit, Mr. Wallace heard noises emanating from the second floor (Tr. 44). He could not tell from which of two upstairs apartments they were originating (Tr. 44). About twenty minutes after Wallace's arrival, Lohr left the apartment and went upstairs to request quiet (Tr. 45-46). Wallace left simultaneously to go next door to get Mr. Sexton, the landlord (Tr. 45). Wallace was absent from the apartment building for about 4 or 5 minutes (Tr. 47). On his return, he saw Lohr retreating down the stairs followed by appellant waving a knife about one stairway step away from Lohr (Tr. 48). Wallace did not see the actual stabbing and could not tell whether or not Lohr had been stabbed when he first observed him (Tr. 49). Lohr came down to the landing before he told Wallace he had been stabbed (Tr. 39 and 50). Wallace helped Lohr into Lohr's apartment (Tr. 50).

Sexton, the landlord, had a broken leg and was on crutches (Tr. 47). He did not arrive at the Lohr apartment house until a short time after Wallace returned (Tr. 47). According to Wallace, ". . . he wasn't making as good a time as I was because he was walking on crutches." (Tr. 47).

The police arrived at the scene a few minutes later (Tr. 51). Lohr was unconscious or semi-conscious at the time and did not give the officers a statement (Tr. 51). Wallace did not talk to the officers, according to his testimony (Tr. 51).[1]

The testimony of the arresting officer, as to the information in his possession prior to his proceeding to the second floor where he arrested the Appellant and searched the premises, is somewhat confused (Tr. 64-65). The ultimate inference is that he talked to Sexton, the landlord, who must have arrived on the scene after the assault occurred because he was behind Wallace and therefore could not have been an eyewitness (Tr. 65).[2] The officer had spent no more than 3 or 4 minutes on the first floor (Tr. 62). The testimony indicates that on the hearsay

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1 Officer Private Harry A. Schwab testified that he talked to Wallace ten or fifteen minutes after arrival (Tr. 67). This conflicts with Wallace's testimony that he did not make any statement to the police. (Tr. 51) The conflict as to whether such conversation occurred is immaterial for present purposes for even if Officer Schwab did talk to Wallace, it would have occurred after the arrest and not before it.

2 Sexton did not appear as a witness at the trial. Officer Schwab testified he "understood" both Sexton and Wallace were present at the time of the stabbing (Tr. 67). This "understanding" did not and could not have come from Wallace. With respect to Sexton, who arrived at the scene shortly after Wallace, it would have been impossible for him to have witnessed the stabbing. Wallace, who returned to the apartment house earlier, testified he had not witnessed the stabbing although he was interrogated at length about the details of what he observed (Tr. 48-51). It is inconceivable that Wallace, a later arrival, could have observed it.

account of Sexton, Officer Schwab proceeded promptly to the second floor apartment of the Appellant (Tr. 57-58). He entered the apartment of the Appellant (Tr. 57-58).

Davis and Appellant were present. He asked which one was Booth (Appellant). He received no reply (Tr. 58). Appellant was lying on a bed in the apartment (Tr. 58).

According to the testimony, the following occurred:

Q. (Mr. Epstein) "What was your exact question?

A. (Officer Schwab) "I said, 'Did you cut the man downstairs and is this the knife?' and his answer was yes." (Tr. 59). The officer had picked up the knife which he saw in the apartment "as I was asking" the question (Tr. 59).

The trial record is devoid of evidence that entry into the apartment and its search were legally made by the arresting officer. There is no evidence that the arresting officer advised Appellant of his authority, the purpose of his entry and the Constitutional rights of the Appellant. There is no evidence that Officer Schwab had prior acquaintance with the reputation of Sexton, on whose complaint he proceeded to the second floor apartment, for veracity and reliability.

The knife and, as indicated above, the oral admission of the Appellant were admitted in evidence.

At the conclusion of the Government's case, appointed counsel below moved for a judgment of acquittal which was denied (Tr. 68). The grounds for the motion were that "there may have been some defect in the prosecution's case which I have not observed" (Tr. 68).

Appellant, an indigent, was confined within the District of Columbia jail from the time of his arrest on September 22, 1963 until after his trial on March 3 and 4, 1964.

The facts with respect to the delay of Appellant's trial are reflect-

ed in the record as follows:

1. November 2, 1963. Appellant was arraigned. He pleaded not guilty and his case was remanded for trial during the week of January 6, 1964.

2. January 9, 1964. Appellant's trial was continued until the week of January 20, 1964. The notation reflects that the Criminal Courts were in trial.

3. January 27, 1964. Case was re-assigned for trial. Defense witness in the hospital. New trial date to be set at a later date.

4. February 11, 1964. Case continued. Assistant U.S. Attorney in trial.

5. February 12, 1964. Case continued. Assistant U.S. Attorney in trial.

6. February 13, 1964. Case continued to February 24, 1964. Criminal Courts in trial.

7. February 24, 1964. Oral motion of appellant for dismissal for want of prosecution heard, argued and denied. Government to try to locate complaining witness. Counsel and defendant instructed to come into Court at 10:00 A.M. on February 27, 1964 for further hearing.

8. February 27, 1964. Case continued to March 2, 1964. Criminal Courts in trial.

9. March 2 and 3, 1964. Trial of Appellant.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution - Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Constitution - Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution - Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

215 F2d 324
361 US 98
32 USLW 4258
222 F2d 256
357 U.S. 301
179 F2d 456
289 F2d 894

~~* 263 F2d 902~~
~~358 US 307~~
308 F2d 265
~~* 311 F2d 126~~
~~336 F2d 415~~

Summary of Argument

I. The entry and search of Appellant's apartment and Appellant's Arrest were illegal because the arresting officer did not have probable cause.

II. The knife and Appellant's admission should have been suppressed because they were the product of a search and seizure not shown to be legal.

III. Evidence with respect to Appellant's admission should have been excluded because it was obtained in a manner inconsistent with appellant's right to assistance of counsel guaranteed by the Sixth Amendment.

IV. Appellant was denied his right to a speedy trial guaranteed by the Fifth Amendment.

ARGUMENT

I

The Entry and Search of Appellant's Apartment and Appellant's Arrest Were Illegal Because the Arresting Officer Did Not Have Probable Cause

The process of criminal justice is divided into different parts. Detection and apprehension are police functions. McNabb v. United States, 318 U. S. 332, 343 (1943).

There are limitations placed upon police procedures. Under our system, suspicion is not enough for an officer to lay hands on a citizen. To arrest a person without a warrant, it is clear that probable cause must exist at or before the time of arrest. Henry v. United States, 361 U.S. 98 (1959).

The circumstances of this case do not reflect that sufficient investigation had been made to determine that reasonable grounds existed for the arrest of the defendant. The arresting officer arrived at the apartment house where the stabbing had taken place. He spent no more than three or four minutes on the first floor. During this time, he was informed that a crime had been committed and the nature of the crime. He testified that the victim was in a semi-conscious condition and that he did not talk to him (*Cf.* Tr. 64 and 65). He did talk to Sexton, the landlord. Sexton did not testify at the trial. There is no probative evidence that Sexton, who was on crutches and proceeding from an adjacent building, had seen the assault incident. On the contrary, the evidence in this record shows that Wallace, who returned to the apartment earlier, even though interrogated at length about the incident, did not see the incident. There is no evidence that Sexton was a reliable informant prior to the arrest (*Cf. Draper v. United States*, 358 U.S. 307 (1959)). This Court has held that uncorroborated information for a person whose identity and reliability are both unknown does not constitute probable cause to make an arrest. *Contee v. United States*, __App. D.C. ____, 215 F2d 324, at 327 (1954). Here there was no showing of Sexton's reliability.

Without more ado, Officer Schwab ascended to the second floor and entered Appellant's apartment. This entry was without a warrant. At this point in time, he could have had no more than a suspicion.

Upon entry, he found Appellant lying on a bed. Certainly, this was not an act or mark of a man fleeing or acting furtively. There were no special circumstances requiring immediate action. See *Henry v. United States, supra*, and *Contee v. United States, supra*.

We submit that when the arresting officer entered Appellant's apartment to question Appellant and search for the weapon, he had done so without probable cause and in violation of Appellant's constitutional rights. From the very moment of the officer's entry, Appellant

was restrained of his full liberty. *Long v. Ansell,* _____ App. D.C. _____, 69 F2d 386, at 389 (1934). Evidence obtained through such illegal search and seizure cannot be used against appellant.

II

The Knife and Appellant's Admission Should Have Been Suppressed Because They Were the Product of a Search and Seizure Not Shown To Be Legal

In this case, the police officer entered Appellant's apartment without a warrant. He searched the apartment and he interrogated and obtained self-incriminating admissions from Appellant while there. After obtaining these, according to the police officer:

"I just arrested him for the offense." (Tr. 60).

It is settled law that even where probable cause exists a warrantless search is forbidden unless made incident to a valid arrest or justified by exceptional circumstances. *Preston v. United States,* ___ U.S. ____, 32 U.S. L. Week 4258 (1964).

As pointed out above, the entry and arrest here were not legal. Moreover, there were no exceptional circumstances shown to exist. On the contrary, Appellant was not fleeing or acting furtively. He was lying on his bed in the apartment.[3]

The trial court should have excluded the evidence obtained by this illegal entry, *sua sponte*. *Cf. Wrightson v. U.S.,* ___ App. D.C. ___, 222 F.2d 556 (1955).

If the police do not follow the manner of entry prescribed, all items subsequently seized should be suppressed since the officer's presence

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[3] Furthermore, the companion of the arresting officer came with him and one of the officers could have proceeded to obtain a warrant while the other remained guard.

on the premises is illegal. *Miller v. United States*, 357 U.S. 301 (1958); *Accarino v. United States*, ___ App. D.C. ___, 179 F.2d 456 (1949); *Hair v. United States*, ___ App. D.C. ___, 289 F.2d 894 (1961). Time and again, the Courts have held that evidence obtained through an illegal search is inadmissible. (See, *e.g.*, *Weeks v. U.S.*, 232 U.S. 383; *Agnello v. United States*, 269 U.S. 20 (1925); and *Wong Sun v. United States*, 371 U.S. 471 (1963)). The oral admission of the Appellant derived immediately from the unlawful entry and the unauthorized arrest. No valid distinction can be drawn between the tangible evidence discovered in the illegal search (the knife) and the intangible evidence (the self-incriminating admissions) obtained under the facts of this case.

III

Evidence With Respect to Appellant's Admission Should Have Been Excluded Because It Was Obtained in a Manner Inconsistent With Appellant's Right to Assistance of Counsel Guaranteed by the Sixth Amendment

In this case, when Officer Schwab entered Appellant's apartment, he had his suspect pinpointed. His first inquiry was which of the two men in the apartment was Booth (Appellant).

The line between investigation and accusation had been crossed. The officer was not making a general investigation of persons in the apartment building to obtain information about the crime. He was seeking out a single individual.

The Appellant, a housepainter who had been drinking beer, was confronted in his own apartment by a police officer. The officer picked up a knife which he observed on the floor of the apartment and, turning to Appellant, his "exact question" was:

> "Did you cut the man downstairs and is this the knife?" (Tr. 59).

In the circumstances of this case, where a specific individual suspect is involved, the Constitutional guarantee of the Sixth Amendment applied at the moment the police officer formed an opinion that Appellant had committed the crime and proceeded to question him with regard to his guilt.

Obviously, in the circumstances of this case, we do not contend there was an unnecessary delay between the apprehension and bringing the Appellant before a judicial officer. *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

If the interrogation without counsel had occurred after indictment, it is clear that Appellant's admission would not have been admissible. *Massiah v. United States*, ___ U.S. ___, 12 L. Ed. 2d 246 (1964). The separate dissenting opinion of Justice White [4] in the *Massiah* case interprets the majority opinion as follows:

> " . . . the new rule would exclude all admissions made to the police no matter how voluntary and reliable . . . " (12 L. ed 246 at 252).

Thus, it is not necessary for the Court to reach the question of whether or not Appellant's were voluntary. There are elements here which could be construed as rendering the admission involuntary. The fact of confrontation in his own apartment by a police officer asking an accusatory question has a certain emotional duress. It must also be borne in mind that this was a housepainter who had been drinking beer.

This Court has had occasion to apply the doctrine enunciated in *Massiah*, and in *Escobedo v. Illinois*, ___ U.S. ___, to admissions and self-incriminating statements obtained after arrest and prior to indictment. *Queen v. United States*, ___ App. D.C. ___ (Slip Opinion, June 29, 1964—No. 18035). *Ricks v. United States*, ___ App. D.C. ___ (Slip Opinion, June 9, 1964—No. 17771). In *Queen*, the interrogation took

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[4] With whom Justice Clark and Justice Harlan concurred.

place after arrest and during a continuance obtained to permit the accused to obtain counsel. Here for all practical purposes it also took place after arrest for Appellant was restrained from the moment the officer entered the apartment.

More recently, this Court, in *Jackson v. United States*, ___ App. D.C. ___ (Slip Opinion, August 13, 1964, No. 17746), ruled in a 2-1 opinion that statements made by an uncounseled person in custody were admissible. In *Jackson*, there were elements which are not present here. The majority opinion in *Jackson* points out that the person in custody was advised by the officers he did not have to speak (p. 3). The dissent observes that there was testimony that he was advised he did not have to make a statement, that any statement made could be used against him, and that he was entitled to any attorney (p. 11).

It is clear that in this case the arresting officer failed to forewarn Appellant that he was entitled to similar safeguards. In order to have a reasonable opportunity to adopt a course of conduct which would not prejudice his defense, Appellant should have been forewarned of his right to counsel and right to remain silent. An ordinary citizen who is restrained in his own apartment by a police officer and is called upon by the officer to respond to a criminal charge, is at a point where the assistance of counsel is needed. Appellant should have been afforded an opportunity to obtain counsel before responding.

In any event, whether or not he was forewarned does not reach the vital issue here. Even if he had been warned, it is quite different when a police officer tells him he may remain silent from being told by counsel what he should or should not do.

IV

Appellant Was Denied His Right to a Speedy Trial Guaranteed by the Fifth Amendment

Appellant was indicted on November 18, 1963. His trial was set forth the week of January 6, 1964. Seven continuances of the trial date were granted. Only one of these continuances is shown to be occasioned by the Appellant. This was on January 27, 1964, until a new date was set. Such date was set for February 11, 1964. All other continuances were due to Criminal Courts calendar being full or the Assistant U.S. Attorney being in trial.

On February 24, 1964, an oral motion was made on behalf of Appellant for dismissal for want of prosecution. This was denied. The trial commenced on March 2, 1964.

Delay was prejudicial to Appellant who languished in jail during the period from the time of his arrest until the trial.

We submit that, although there is not shown here a situation of mental deterioration comparable to the situation in *Marshall v. United States*, ___ App. D.C. ___, ___ F.2d ___ (Slip Opinion, June 30, 1964), continuous incarceration has a debilitating effect upon a person's capacity to effectively cooperate in his own defense and that the terminal point had been reached by February 24, when the motion to dismiss was made and it should have been granted.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment be reversed.

Respectfully submitted,

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Attorney for Appellant
(appointed by this Court)

November 6, 1964

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,762

NATHAN M. BOOTH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
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FRANK Q. NEBEKER,
DAVID EPSTEIN,
Assistant United States Attorneys.

DANIEL H. BENSON,
Attorney, Criminal Division,
Department of Justice.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Whether appellant's knife, seized incident to his arrest without a warrant, should have been excluded from admission in evidence where there was no pretrial motion to suppress, no objection to admission of the knife in evidence at trial, and no issue raised or developed during trial regarding an alleged lack of probable cause.

2. Whether there was error in the admission of testimony about a threshold statement made by appellant to the arresting officer in the absence of counsel, where there was no objection to such testimony at trial and where appellant judicially admitted the facts embraced in the statement.

3. Whether a delay of slightly over five months between arrest and trial, occasioned by calendar congestion in the criminal courts, difficulty in securing the presence of witnesses, and other trial obligations of the prosecutor and defense counsel, deprived appellant of his constitutional right to a speedy trial.

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,762

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed November 18, 1963, appellant was charged with assault with a dangerous weapon, in violation of 22 D.C. Code 502. On March 4, 1964, after a trial by jury, appellant was found guilty as charged and on April 10, 1964, he was sentenced to imprisonment for two to seven years. This appeal followed.

Events Leading up to the Assault

The assault occurred at about noon on Sunday, September 22, 1963, in the apartment building where appel-

lant and his victim, David Lohr, lived (Tr. 3, 36, 57, 69-70, 93-94). Appellant and a roommate, Jim Davis, occupied an apartment on the second floor immediately above the first-floor apartment occupied by Lohr and his wife (Tr. 5, 70). Appellant and Davis, who had been out drinking beer together Saturday night, returned to their apartment around 11:30 p.m., and when they arose Sunday morning they resumed their drinking (Tr. 75-76, 86, 89-90, 95, 97-98). During the morning they had a loud, heated argument which lasted about fifteen minutes (Tr. 70-74, 77, 90-91, 105-106). The noise made by appellant and Davis disturbed Lohr, who was drinking coffee in the kitchen of his apartment with a friend, Truman Wallace; Lohr was afraid the noise would disturb his wife who was trying to sleep (Tr. 3-6, 36-37, 42, 44-45). Lohr went upstairs to request quiet from appellant and Davis, and Wallace went to the adjoining building to get the resident manager, Dan Sexton (Tr. 6, 36, 45-47, 61).

The Assault and Those Who Witnessed it

In response to Lohr's knock, Davis opened the door and talked with Lohr briefly (Tr. 6, 24). Davis said that he and appellant would quiet down, whereupon Lohr started back down the hallway to the stairs (Tr. 6, 25-26). As Lohr prepared to go down the stairs, he turned and saw appellant approaching with a knife (Tr. 6-7, 26). Lohr began backing down the stairs, and appellant jumped down the stairs after him (Tr. 7). Wallace, who had returned by this time with the resident manager, Sexton, saw Lohr backing down the stairs and saw appellant coming down the stairs facing Lohr (Tr. 37-38). Wallace saw appellant making a "jabbing" motion with a knife (Tr. 39-40). Davis, who was standing at the top of the stairs, threw a beer bottle which hit Wallace in the head (Tr. 40, 49-50). The resident manager, Sexton, was waving his crutches, "hollering for Nathan Booth [appellant] to get back up the steps . . ." (Tr. 50). When Lohr reached a small landing on the stairs, appellant stabbed

Lohr in the side (Tr. 7).[1] Lohr eventually reached the bottom of the stairs and said, "I have been stabbed," or "I have been cut" or "something to that effect" (Tr. 7, 39, 50).[2]

Actions of the Arresting Officer

Private Harry Schwab of the Metropolitan Police Department arrived at the scene of the stabbing within a few minutes after the events described above (Tr. 51, 57). Officer Schwab observed Lohr lying on the floor and tried unsuccessfully to question him (Tr. 61, 63, 66). Sexton was present and was interviewed by the officer (Tr. 61, 65). Officer Schwab spent three or four minutes on the first floor, and during that time he was given appellant's name and description by a witness (Tr. 58, 62). Sexton told Officer Schwab what had happened, and Schwab understood that both Sexton and Wallace witnessed the stabbing (Tr. 66-67). Officer Schwab then went upstairs and entered appellant's apartment (Tr. 57, 67). Appellant was lying on the bed, and Davis was in the kitchen (Tr. 58, 62, 104, 111). After "getting the information for the reason we were there, a cutting,"[3]

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[1] Lohr was seriously injured by the stabbing; the wound penetrated his left side, injuring the spleen and subsequently injuring the heart (Tr. 33-34).

[2] Appellant's version of the incident was that Lohr entered appellant's apartment alone and assaulted appellant, in response to which appellant defended himself with the knife (Tr. 99-103, 106-111). Davis testified, however, that both Lohr and Wallace entered appellant's apartment, that there was no assault as described by appellant, and that Lohr and Wallace left the apartment with appellant following them (Tr. 78-84, 86, 88, 91).

[3] Read in the context of the officer's narrative, it appears that this statement means the officer told appellant and Davis why the police were there in the apartment—"the reason we were there" (Tr. 58). The statement probably means that appellant and Davis "got" the reason for the officers' presence before any questions were asked. It is unlikely that the officer was referring to the information he obtained on the first floor from the witnesses, for at the time he gave this testimony, he was being questioned about what he did after entering appellant's apartment.

Officer Schwab asked Davis whether the man on the bed was appellant, and Davis answered "yes" (Tr. 58-59). Officer Schwab, observing a bloodstained knife on the floor, asked appellant, "Did you cut the man downstairs and is this the knife?" (Tr. 59, 104). Appellant answered "yes" to both parts of the question (Tr. 59, 104). Officer Schwab then arrested appellant and seized the knife (Tr. 60, 67, 104).

Proceedings

The indictment against appellant was filed on November 18, 1963. On November 21, 1963, appellant was arraigned. He entered a plea of not guilty; bail was increased from $2,500 to $3,000, and the case was scheduled for trial during the week of January 6, 1964. Because of the press of other cases in the criminal courts the case was first continued to the week of January 20, and then to the week of January 27, 1964. On January 27, 1964, because a defense witness was in the hospital, the case was reassigned for trial. On February 11 and 12, 1964, the case was continued to the following successive days because the Assistant United States Attorney was in trial, and on February 13, 1964, the case was continued to February 24, 1964. Appellant objected to none of these continuances.

On February 24, 1964, appellant moved to dismiss for want of prosecution. After oral argument was heard, the motion was denied. The government was attempting to locate the complaining witness, and a further hearing on the matter was set for February 27, 1964. On February 27, 1964, the case was continued to March 2, 1964, because the criminal courts were in trial. Defense counsel was in trial on March 2, 1964, so that trial did not begin until March 3, 1964.

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of any assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

SUMMARY OF ARGUMENT

I

Appellant's arrest without a warrant was supported by probable cause since the following crucial facts were within the knowledge of the arresting officer: (1) a man had been stabbed and was lying bleeding and unconscious at the scene of the stabbing; (2) at least two persons witnessed the stabbing; (3) the officer's information as to what had happened came from one of those witnesses; (4) appellant was identified by a witness as the person who did the stabbing; (5) one of the witnesses provided a description of appellant that was accurate enough to enable the officer to recognize appellant. Those facts and circumstances at that particular time and place would have indicated to any reasonable and prudent police officer that an offense had been committed and that appellant was the offender.

Since the arrest was lawful, the seizure of the blood-stained knife, which was lying on the floor of appellant's apartment in plain view of the arresting officer, was also lawful.

Pretermitting the merits of any issues on the legality of the arrest and seizure, appellant has no standing to complain since he did not raise those issues at any time below and now on appeal seeks to raise them for the first time.

II

There is no rule that statements made to police officers out of the presence of counsel, irrespective of the circumstances under which they were made, are inadmissible at the trial. Testimony regarding the oral statement that appellant made to the arresting officer while still at the scene of the offense and within minutes after it had occurred, in response to the officer's routine inquiry as to what happened, was properly admitted in the absence of any objection by appellant.

In any event, appellant suffered no prejudice since he based his entire case on a claim of self-defense and supported such claim by judicially admitting the facts embraced in his statement to the arresting officer.

Appellant has no standing to complain regarding this issue since he did not raise it at any time below and seeks now on appeal to raise it for the first time.

III

The delay in this case was not deliberate or oppressive. It resulted from a congested calendar in the criminal courts, difficulty in securing the presence of a defense witness and a prosecution witness, and the involvement of the prosecutor and defense counsel in other trials. Appellant suffered no prejudice beyond that which ensued from the ordinary and inevitable delay involved in processing the case, and his defense was in no way hampered or curtailed by such delay.

The right to a speedy trial is necessarily relative and is consistent with some delay. While it secures rights to a defendant, it does not preclude the rights of public justice. Under the circumstances, there was no abuse of discretion in the district court's denial of appellant's motion to dismiss for lack of prosecution.

ARGUMENT

I. Appellant's arrest without a warrant was supported by probable cause, the seizure of the weapon was lawful, and appellant lacks standing to complain on this issue because he did not raise it below.

(See Tr. 51, 57-63, 65-67, 104, 111)

When Officer Schwab arrived at the scene of the stabbing, he found David Lohr lying on the floor, bleeding and unconscious. Unable to question Lohr, Officer Schwab ascertained what had happened from the resident manager of the apartment building, Dan Sexton. It was Officer Schwab's understanding that both Sexton and Truman Wallace had witnessed the stabbing. A witness—apparently Sexton—gave Officer Schwab appellant's name and description. At this point, the officer clearly had a duty to go to appellant's apartment, at the minimum to investigate what had happened. Because the issue of probable cause was not raised at the trial, the record does not reflect how Schwab effected entry into appellant's apartment, but there is no indication that the entry was other than peaceable. Even assuming that the entry was without express permission, the entry into the apartment was justified since there was at this point probable cause for appellant's arrest. See *Washington* v. *United States*, 105 U.S. App. D.C. 58, 263 F. 2d 742 (1959), *cert. denied*, 359 U.S. 1002. The fact that a stabbing had occurred was observed by the officer, and the identity of the appellant had been supplied by a disinterested person who had witnessed enough of the incident to be able to identify the assailant. This was sufficient to meet the standard of probable cause laid down by the cases—the reasonable belief of a prudent officer that an offense had been committed and that appellant had committed it. *Draper* v. *United States*, 358 U.S. 307 (1959); *Williams* v. *United States*, 113 U.S. App. D.C. 371, 308 F. 2d 362 (1962); *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 302 F. 2d 194 (1962); *Dixon* v. *United States*, 111

U.S. App. D.C. 305, 296 F. 2d 427 (1961); *Ellis* v. *United States*, 105 U.S. App. D.C. 86, 264 F. 2d 372 (1959), *cert. denied*, 359 U.S. 998.

Once Officer Schwab had entered appellant's apartment, he saw appellant's bloodstained knife lying in plain sight on the floor. Appellant admitted to officer Schwab that he cut Lohr, and that he did so with the bloodstained knife observed by Schwab. Manifestly at that point there was more than ample probable cause for the arrest. Incident to the arrest, the officers clearly had authority to seize the bloodstained knife, which was an instrumentality of the crime, in plain view. See *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); *Ellison* v. *United States*, 93 U.S. App. D.C. 1, 206 F. 2d 476 (1953).

In any event, appellant has no standing to complain about the legality of the arrest and seizure since he did not raise those issues at any time below, either by motion to suppress or to exclude the evidence at the trial. It is well settled that the right to object to an illegal seizure is waived unless there is a timely motion to suppress before trial, or development at trial of the issue of probable cause. *Gray* v. *United States*, 114 U.S. App. D.C. 77, 311 F.2d 126 (1962); *Cromer* v. *United States*, 78 U.S. App. D.C. 400, 142 F.2d 697 (1944), *cert. denied*, 322 U.S. 760.

II. Appellant's oral statement to the arresting officer was properly admitted in evidence, and appellant suffered no prejudice by its admission.

(See Tr. 57-59, 62, 67, 99-103, 104, 106-111)

Appellant contends that his admission to Officer Schwab, before he was actually arrested, that he cut the man downstairs with a knife that was on the floor, should have been excluded as made without counsel at a time when suspicion had centered on appellant. As this Court has recently stated, however, there is no rule that statements or admissions made to police officials out of the presence of counsel are inadmissible at the trial, irrespec-

tive of the circumstances under which they were made. *Long* v. *United States*, No. 18,368, decided October 22, 1964; *Jackson* v. *United States*, —— U.S. App. D.C. ——, 337 F.2d 136 (1964). Here the officers were investigating a crime which had just occurred as to which appellant had been named as the assailant. It was entirely reasonable to ask appellant if the information were true and therefore proper to admit his statement that he had in fact administered the cut.[4]

Moreover, appellant was not prejudiced by the admission of the evidence of his simple statement that he had cut Lohr. Appellant's case was based on a claim of self-defense; although he testified that David Lohr assaulted him, he judicially admitted cutting and stabbing Lohr with the knife in question (Tr. 99, 100, 102, 103, 104, 106, 110). Appellant's statement to Officer Schwab did not detract from the claim of self-defense; indeed, if anything, it tended to support appellant's case since it was evidence that appellant felt he had nothing to hide from the police.

It is significant that appellant made no objection at the trial to the admission of the officer's testimony as to his oral statement. Objections to the admissibility of evidence must be made at the time the evidence is offered; otherwise there will be no reversal unless a miscarriage of justice would result. *Scott* v. *United States*, 115 U.S. App. D.C. 208, 317 F. 2d 908 (1963); *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F. 2d 243 (1962); *Tatum* v. *United States*, 114 U.S. App. D.C. 51, 310 F. 2d 856 (1962); *Swift* v. *United States*, 314 F. 2d 860 (10th Cir. 1963); *Billeci* v. *United States*, 290 F. 2d 628 (9th Cir. 1961); *Smyly* v. *United States*, 287 F. 2d 760 (5th Cir.

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[4] Appellant asserts that the arresting officer did not advise him of his applicable rights, but the record does not reflect the presence or absence of such advice since the issue was not raised in any form below. It appears probable that Officer Schwab did advise appellant of the reason for the presence of the police (Tr. 58). See *Ramey* v. *United States*, —— U.S. App. D.C. ——, 336 F.2d 743, *cert. denied*, 85 S.Ct. 79 (1964), for a similar fact situation.

1961), *cert. denied*, 366 U.S. 930. It is clear that the interests of justice would not require reversal of this case.

III. The delay in this case did not deprive appellant of a speedy trial.

(See docket entries, and court clerk's memorandum entries, Criminal No. 1092-63)

The delay in this case was not purposeful or oppressive. It was due to the congested trial calendar of the criminal courts, difficulty experienced by the defense and the government in securing the attendance of witnesses, and the involvement of the Assistant United States Attorney and defense counsel in other trials. Appellant suffered no prejudice to his defense by the delay.

In the press of cases awaiting trial in the criminal courts, some calendar congestion is inevitable, as this Court noted in *King* v. *United States*, 105 U.S. App. D.C. 193, 265 F. 2d 567 (1959), *cert. denied*, 359 U.S. 998. Appellant was tried as soon as the orderly conduct of the business of the courts permitted consistent with the right of both the prosecution and the defense to secure the presence of necessary witnesses. See *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 303 F. 2d 411 (1962), *cert. denied*, 370 U.S. 946. Appellant suggests no reasonable alternative to the methods followed here in handling the caseload of the courts and the problems arising from the absence of witnesses.

The right to a speedy trial is relative, is consistent with delays, depends upon circumstances, and does not preclude the rights of public justice. *Beavers* v. *Haubert*, 198 U.S. 77, 88-87 (1905); *Smith* v. *United States*, —— U.S. App. D.C. ——, 331 F. 2d 784 (1964). In the circumstances presented by this record, there was no abuse of discretion by the trial court in denying the motion to dismiss for want of prosecution.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,762

NATHAN M. BOOTH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Forma Pauperis Appeal From a Judgment of the
United States District Court
for the District of Columbia

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December 19, 1964

UNITED STATES COURT OF APPEALS
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REPLY BRIEF

I

The Arrest Was Made Without Probable Cause and Illegal

There appear to be significant disagreements between Appellee and Appellant with respect to the facts.

Appellee states, "... the following crucial facts were within the knowledge of the arresting officer ... (2) at least two persons witnessed the stabbing; (3) the officer's

information as to what happened came from one of these witnesses ...". (Appellee's Brief, page 5).

This is not so. The transcript shows that the alleged witnesses were Truman Wallace and Dan Sexton. As pointed out in our Brief, Wallace did not witness the stabbing. (Appellant's Brief, pages 2-3). Sexton arrived on the scene later than Wallace. (Tr. 47). He could not have witnessed it.

Before the arrest, the officer talked only with Sexton (Tr. 65). This entire procedure took only three or four minutes (Tr. 62). The officer then proceeded to the second floor and arrested Appellant. He did not talk to Wallace until after the arrest (Tr. 67).*

Wallace testified he had not observed the stabbing (Tr. 49). Sexton did not appear as a witness at the trial, but the time sequence establishes he could not have observed it because he arrived at the apartment building later than Wallace.

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*The transcript reads in part:
"Q. He (Sexton) was the only person you talked to with reference to this incident at the time you first arrived?"
A. (Officer Schwab) He was the first one I talked to. I talked to a Truman Wallace, maybe fifteen minutes later, ten or fifteen minutes later."
(Underscoring supplied)

Appellee's Brief describes Sexton as a "disinterested person" (Appellee's Brief, page 7). There certainly is no evidence to support this description. There is no showing as to the nature of the personal relationship between Appellant and Sexton. Moreover, there is no evidence that Sexton had established himself as a reliable informant. This would have been most difficult - if not impossible to do - in the span of three or four minutes, only a portion of which could have been devoted to a conversation between the officer and Mr. Sexton.

In fact, the unreliability of Sexton or the inadequacy of the officer's investigation is dramatically illustrated by the officer's testimony with respect to the place of the stabbing. The officer testified at least three times that Sexton reported the stabbing took place in the victim's apartment - and in the victim's kitchen (Tr. 64-66).*

In sum, the officer did not talk to a witness of the crime. He relied entirely on a hearsay account of a person who had not witnessed the stabbing. This person's unreliability is shown by his erroneous statement as to where the event took place. The officer was accompanied by a partner. There was no necessity or justification to arrest Appellant without a

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*This highly prejudicial double-hearsay was admitted in evidence.

warrant. One officer could have remained on the premises while the other obtained a warrant. There was no activity on the part of the Appellant indicating an intention to flee, nor was he acting furtively.

Appellee argues "there is no indication that the entry (of the police officer) was other than preaceable. Even assuming that the entry was without express permission, the entry was justified ..." (Appellee's Brief, page 7). We submit that, if the entry was forcible, there was plain error in admitting Appellant's self-incriminating statement and the knife.

There is no indication that the entry was peaceable. It was the burden of the Appellee to establish that it had met the standard of peaceable entry - particularly under the facts of this case, which reflect inordinate haste and dispatch.

Failure of Appellant, through appointed counsel, to raise the questions about the legality of the arrest and the unlawful search and seizure does not preclude the Court from affording substantial justice either its general supervisory power or Rule 52(b) of the Federal Rules of Criminal Procedure.

II

Appellant Was Deprived of
His Right to Assistance of Counsel

The only testimony relating to any preliminaries after the entry of the officer into the apartment of Appellant is the following:

> "A. (Officer Schwab) After getting the information for the reason we were there, a cutting, I asked who was Mr. Booth, and I had no reply, and knowing the description of Booth from a witness I observed Booth laying on the bed, and I asked Davis if this was Booth. He said 'yes'." (Tr. 58-59)

Immediately after this, the officer confronted Booth and asked him if he cut the victim and if the knife the officer had picked up was the weapon (Tr. 59). The questions directed to the officer sought to elicit all the details of what transpired in Appellant's apartment. There is no testimony by the officer that Appellant was notified of his right to remain silent and to obtain counsel.

The totality of circumstances reflected in the transcript reflect an effective deprivation of counsel.

Appellant had neither counsel nor the opportunity to obtain one. To contend, as Appellee does, that such deprivation was not prejudicial is to make the judgment that the defense to which Appellant resorted at the stage of his trial is the same as it would have been had he the assistance of counsel - at the point the self-incriminating statement was obtained.

Failure of Appellant, through counsel, to object does not cure this defect. This Court has authority to grant relief to avoid a miscarriage of justice.

III

Appellant Has Been Denied His Right To A Speedy Trial

Appellant was deprived of a speedy trial by the unjustified delay between arrest and trial. Appellant, a house painter without means, accused of an assault with a dangerous weapon but alleging that he was merely acting in self defense, was forced to spend over five months in jail awaiting trial. Appellee's argument that congested trial calendars are inevitable and that no prejudice resulted to Appellant's defense, wholly fails to recognize the fact that the deprivation of five months of an accused's liberty and life are prejudicial enough. Indeed, Appellee must be mocking the Appellant in

this case by arguing that he "suggests no reasonable alternative to the methods followed here in handling the caseload of the courts ...". It is certainly not for a house painter with limited means to offer Appellee suggestions that will cure such defects in the judicial machinery as now result in the denial of justice.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment be reversed.

Respectfully submitted,

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(Appointed by this Court)

December 19, 1964